Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–19 OF 2000 (P)

WAN ADNAN CHIEF JUDGE (MALAYA), AHMAD FAIRUZ AND SITI NORMA YAAKOB FCJJ

22 AUGUST 2001

Land Law *— Acquisition of land — Award — Quantum of award — Appeal against decision of High Court — Market value — Methods of valuation — Potential development of land — Whether agreement reached between parties as to valuation of land — Applicability of National Land Code 1965 s 214A*

This appeal on land acquisition was only on the question of quantum. This was so as differing valuations were expressed in the valuation reports prepared by the respective valuer employed by the parties. The difference in the two valuations was largely due to the different approach adopted by the valuers with the respondent's valuer proceeding on the basis that the development potential for the lands was remote as the lands were zoned as agricultural land and used for animal husbandary. The appellant's valuer considered otherwise. Three issues were raised by the appellant and they relate to: (i) the specific agreement reached between the parties on the first day of hearing on 13 June 1994 to accept the appellant's valuation; (ii) the applicability of s 214A of the National Land Code 1965 ('the NLC'); and (iii) the fair market value of the lands.

Held, dismissing the appeal:

(1) A perusal of the proceedings recorded by the learned judge showed no such agreement was made between the parties to accept the appellant's valuation of the lands once the development potentiality was established. If indeed there was agreement to accept the appellant's valuation once development potential was established, it was unusually strange that the judge should direct that there be further arguments as to what would be the fair market value of the lands (see p 404B–D).

(2) It was not disputed that the acquired lands form part of estate land. The court did not see how the decision in *Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289 had changed the law regarding the application of s 214A of the NLC in transactions relating to the transfer of estate land before 1998. Regardless of whether the transactions originate between a willing seller and purchaser as was the case in *Kumpulan Sua Betong*, or an unwilling seller and purchaser as in *Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley* [1984] 1 MLJ 164, s 214A of the NLC was one factor that would have to be

considered when arriving at the market value of estate land (see pp 404D, 405D–E).

(3) The learned judge had considered all factors as to locality, size, accessibility, use of the lands at the material time and regard to another award in the same locality as the appellant's lands in arriving at his findings of the fair market value of the appellant's land. The court therefore saw no reason to disturb the findings of the learned judge in this matter (see p 406H–I).

[**Bahasa Malaysia summary**

Rayuan ini mengenai pengambilan tanah adalah hanya atas persoalan kuantum. Ini adalah kerana penilaian-penilaian berlainan telah dinyatakan di dalam laporan-laporan penilaian yang disediakan oleh penilai-penilai masing-masing yang digajikan oleh pihak-pihak yang berkenaan. Perbezaan dalam kedua-dua penilaian tersebut adalah disebabkan pada keseluruhan oleh pendekatan berlainan yang diguna-pakai oleh penilai-penilai dengan penilaian responden yang menggunakan dasar bahawa potensi pembangunan bagi tanah-tanah tersebut adalah terlalu jauh kerana tanah-tanah tersebut telah dizonkan sebagai tanah pertanian dan digunakan untuk perusahaan ternakan. Penilai perayu menimbangkan sebaliknya. Tiga isu telah dibangkitkan oleh perayu yang berkaitan dengan: (i) persetujuan spesifik yang dicapai antara pihak-pihak tersebut pada hari pertama pembicaraan pada 13 Jun 1994 untuk menerima penilaian perayu; (ii) kebolehpemakaian s 214A Kanun Tanah Negara 1965 ('KTN); dan (iii) nilai pasaran tanah-tanah tersebut yang berpatutan.

Diputuskan, menolak rayuan tersebut:

(1) Satu penelitian akan prosiding yang dicatatkan oleh hakim yang arif tidak menunjukkan persetujuan sedemikian yang telah dibuat antara pihak-pihak tersebut untuk menerima penilaian tanah-tanah tersebut oleh perayu sebaik sahaja potensi pembangunan telah dibuktikan. Jika sesungguhnya terdapatnya persetujuan untuk menerima penilaian perayu sebaik sahaja potensi pembangunan dibuktikan, adalah sungguh aneh bagi hakim mengarahkan supaya hujahan seterusnya diadakan berhubung dengan apakah nilai pasaran berpatutan bagi tanah-tanah tersebut (lihat ms 404B–D).

(2) Adalah tidak dipertikaikan bahawa tanah-tanah yang diperolehi itu membentuk sebahagian daripada tanah harta estet. Mahkamah tidak dapat melihat bagaimana keputusan di dalam *Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289 telah menukar undang-undang berhubung dengan pemakaian s 214A KTN dalam transaksi-transaksi yang berkaitan dengan pemindahan tanah harta pesaka sebelum tahun 1998. Tanpa menghiraukan sama ada transaksi-transaksi tersebut

berasal daripada penjual dan pembeli yang rela seperti mana keadaannya di dalam *Kumpulan Sua Betong*, ataupun penjual dan pembeli yang tidak rela seperti mana di dalam *Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley* [1984] 1 MLJ 164, s 214A KTN adalah merupakan satu faktor yang harus dipertimbangkan ketika mencapai nilai pasaran tanah harta pesaka (lihat ms 404D, 405D–E).

(3) Hakim yang arif telah menimbangkan semua faktor berhubung dengan lokasi, saiz, mudah dimasuki, kegunaan tanah-tanah tersebut pada waktu yang material dan berhubung dengan award lain dalam lokasi yang sama seperti tanah-tanah perayu ketika mencapai keputusan beliau mengenai nilai pasaran berpatutan tanah perayu tersebut. Mahkamah oleh itu tiada alasan untuk mencampuri dalam keputusan hakim yang arif di dalam perkara ini (lihat ms 406H–I).]

Notes

For cases on award for aquisation of land, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1542–1579.

Cases referred to

Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley [1984] 1 MLJ 164 (folld)

Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor [1993] 2 MLJ 289 (folld)

Legislation referred to

Land Acquisition Act 1960 ss 12, 49(1), para 1 of First Schedule of the Act sub-para (2D)

National Land Code 1965 s 214A

Appeal from: Acquisition of Land No 15–1 of 1993 (High Court, Pulau Pinang)

RR Sethu (*R Rajasingam* with him) (*R Rajasingam & Co*) for the appellant.

Alizatul Khair bte Osman Khairuddin (State Legal Adviser) (*Ahmad Kamar*, Assistant State Legal Adviser with her) for the respondent.

Siti Norma Yaakob FCJ (delivering judgment of the court)**:** At the outset of this appeal a preliminary point was raised by Dato Alizatul Khair bte Osman Khairuddin, State Legal Adviser, for the respondent, that the consent order of this court dated 18 October 2000, granting leave to the appellant to file this appeal out of time, does not reflect the true status and nature of the proceedings as it failed to include some other pertinent order as well. To understand and appreciate that point it is necessary that we trace the steps how this appeal, a land acquisition matter, came to be before this court.

The starting point is 11 October 1990, as on that date six pieces of agricultural land belonging to the appellant were gazetted for the purpose of compulsory acquisition under the Land Acquisition Act 1960 ('the Act'). A

On 16 April 1992, the respondent held an inquiry under s 12 of the Act and on 7 September 1992, a sum of RM53,197,974 or RM8,167 per acre was awarded as compensation for the total area of 5260 acres acquired. The appellant objected to the award and the respondent referred the matter to the Penang High Court as Land Reference No 15–1–1993. B

Abdul Hamid Mohamad J (as he then was) heard the reference for two days on 13 June 1994, and 4 August 1995, and on 9 October 1995, he, inter alia, increased the award to RM15,000 per acre with interest at 8% pa calculated from 28 November 1992, the date Borang K was issued until the date of settlement. C

The appellant's then solicitors, lodged an appeal to the Court of Appeal on 6 November 1995, and on 22 September 1997, the Court of Appeal dismissed the appeal with costs. Subsequently the appellant filed a motion in this court for leave to appeal and on 11 August 1998, the motion was also dismissed with costs. D

Two years later, the appellant's present solicitors realised that appeals in land reference matters lie directly from the decisions of the High Court to the Federal Court. This is so as the Court of Appeal established on 23 June 1994, had no jurisdiction in land acquisition matters until 1 March 1998, when s 49(1) of the Act was amended to confer such powers and that too in respect of references made after that date. In this case since the reference was made on 15 September 1992, clearly the Court of Appeal lacked jurisdiction when it determined the matter on 22 September 1997. E

It was based on that reasoning that the appellant's solicitors filed a notice of motion dated 7 September 2000, in this court for an extension of time to appeal against the High Court decision dated 9 October 1995, and to proceed to rehear the matter on its merits. On 18 October 2000, this court allowed the application on the undisputed ground that all proceedings in the Court of Appeal and subsequent proceedings relating thereto in this court were null and void. To that end the Court of Appeal order dated 22 September 1997, dismissing the appellant's appeal with costs as well as the order of this court dated 11 August 1998, dismissing the appellant's application for leave to appeal should, for completeness, have been declared to be null and void and expressed to be so in the consent order dated 18 October 2000. However a perusal of that latter order shows no such declaration. It was to correct this omission that Dato Alizatul Khair raised the preliminary point for it is her contention that if left uncorrected the Court of Appeal order dated 22 September 1997, and the order of this court dated 11 August 1998, would appear to be valid and subsisting. For the reasons already stated, this could never be. We entirely agree with her. F G H

It was to correct that omission that Dato RR Sethu, Counsel for the appellant made an oral application to amend the consent order dated 18 October 2000, to include another order declaring the Court of Appeal I

order dated 22 September 1997, and the order of this court dated 11 August 1998, null and void. Since the consent order dated 18 October 2000, was obtained on the common ground that the Court of Appeal lacked jurisdiction to hear this particular reference matter, we had dispensed with the requirement of an affidavit to support the application to amend and ordered that the consent order dated 18 October 2000, be amended to include another order nullifying the two orders dated 22 September 1997, and 11 August 1998. Dato RR Sethu also gave an undertaking that he would extract the order as amended in due course.

Coming now to the merits of the appeal, three issues were raised by the appellant and they relate to:

(1) the specific agreement reached between the parties on the first day of hearing on 13 June 1994;

(2) the applicability of s 214A of the National Land Code 1965 ('the NLC'); and

(3) the fair market value of the lands.

This appeal is not unlike most other land acquisition matters in that the only bone of contention is on the question of quantum, or expressed in another way what constitutes the fair market value of the lands acquired. This is so as differing valuations were expressed in the valuation reports prepared by the respective valuer employed by the parties. The appellant's valuer placed a figure of RM40,000 per acre for the lands whilst the respondent's valuer arrived at a more conservative figure of RM8,000 per acre. The difference in the two valuations is largely due to the different approach adopted by the valuers with the respondent's valuer proceeding on the basis that the development potential for the lands was remote as the lands were zoned as agricultural land and used for animal husbandary. The appellant's valuer considered otherwise.

It is the appellant's contention that faced with the differing valuations, there was an agreement reached with the respondent that they put in written submissions on the single issue as to whether the lands had development potential. If the court decides so, the appellant's value be accepted, if not, the respondent's valuation will prevail.

Dato Alizatul Khair strenously denied there was any such agreement but maintained that what was suggested by the parties and accepted by the High Court was that in view of the undisputed facts as to the acquisition of the lands, the parties submit written submissions based on the valuation reports relied upon by them. She stressed that matters pertaining to the development potentiality of the lands and with it the market value were very much in issue.

Since neither Dato Sethu and Dato Alizatul Khair argued the matter in the High Court, we have to rely largely on the judge's notes as to what had transpired on 13 June 1994.

A perusal of the proceedings recorded by the judge shows no such agreement as made out by Dato Sethu. All that was recorded was the fact

that at the suggestion of both counsels, the judge directed that the parties file and serve written submissions within a month of each other. However the judge's notes do not specify the subject matter of the written submissions but in his written judgment, he explained that to save the court's time, the parties had agreed not to call the two valuers to testify but instead their valuation reports would be relied and commented upon by way of written submissions.

What happened next was that upon receipt and consideration of the written submissions, the judge ruled on 4 August 1995, that the lands had development potential and adjourned the matter to 18 September 1995, to hear further arguments on the market value of the lands. If indeed there was agreement to accept the appellant's valuation once development potential was established, it is unusually strange that the judge should direct that there be further arguments as to what would be the fair market value of the lands.

From the very manner the proceedings were recorded and the subsequent conduct of the proceedings after 4 August 1995, we are more than satisfied that there was no agreement between the parties to accept the appellant's valuation of the lands once the development potentiality was established. That was very much a live issue.

It is not disputed that the acquired lands form part of estate land. To drive home the fact that the compensation awarded was inadequate, the appellant argued that the restriction imposed by s 214A of the NLC, is not applicable when assessing the value of estate land and that the observations expressed by Azmi FJ, in *Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley* [1984] 1 MLJ 164, which was relied upon by the court below are no longer good law and ought not to be followed. This is so following the Supreme Court's decision in *Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289, which decided that estate land can be sold and transferred to any one person or company without the approval of the Estate Land Board. The effect of this submission is that if the restriction of s 214A of the NLC is taken into account, this will reduce the market value of the land as was done in this case. If there is no such legal restraint, the market value of the land will be higher and an that basis estate land is to be valued as any other land.

The restriction imposed by s 214A of the NLC is expressed in the following terms.

> (1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as 'the Board') established under sub-s (3).

Bertam Consolidated which was also concerned with the compulsory acquisition of estate land and decided in 1984, outlines the purpose of s 214A of the NLC to be as follows:

A Section 214A has the effect of prohibiting any transfer, conveyance or disposal in any manner of estate land unless approval is obtained first from the Estate Land Board. The object of this section is to prevent fragmentation of estate land like Bertam Estate without due consideration being given to social and economic consequences to the country. Although the constraint could be removed by application to the Estate Land Board, at the material date the B subject land was not free from that legal as opposed to administrative constraint. As such the learned judge was not wrong in law in taking it into consideration.

Kumpulan Sua Betong on the other hand was concerned with the sale and purchase of estate land where the parties agreed that they would apply to C the Estate Land Board for the approval of the sale. No such approval was obtained before the land was transferred and registered in the name of a third party nominated by the purchaser. The seller sued both the purchaser and the third party for a declaration that the transfer of the land was null and void. The Supreme Court held that there was nothing illegal about the omission to obtain the approval as no approval was necessary where the D transfer was to one person as was done in that case.

We do not see how the decision in *Kumpulan Sua Betong* has changed the law regarding the application of s 214A of the NLC in transactions relating to the transfer of estate land before 1998. Regardless of whether the transactions originate between a willing seller and purchaser as was the E case in *Kumpulan Sua Betong*, or an unwilling seller and purchaser as in *Bertam Consolidated*, s 214A of the NLC is one factor that will have to be considered when arriving at the market value of estate land. Whilst *Bertam Consolidated* states in no uncertain terms that estate land is subject to the constraint of s 214A of the NLC, it did not however deal with the circumstances when approval of the Estate Land Board was required. F *Kumpulan Sua Betong* went one step further and did just that by defining the circumstances when approval of the Estate Land Board becomes necessary. If the transfer is made to one person or an entity then on the authority of *Kumpulan Sua Betong*, approval of the Estate Land Board is not required as there is no risk of fragmentation. But where the transfer is intended to be made to two or more persons and fragmentation is G evidently at risk, the approval of the Estate Land Board becomes a mandatory prerequisite before such a transfer can be effected. As such the decisions in both cases complement each other. It is therefore erroneous to say that *Bertam Consolidated* was premised on the fact that no estate land can be transferred without approval. Following *Kumpulan Sua Betong*, it can be transferred without approval provided such transfer is H made to one person or to one entity, but when it comes to assessing the market value of such lands, it is still subject to the legal restraint of s 214A of the NLC as decided by *Bertam Consolidated*.

The fact that the para 1 of First Schedule of the Act has been amended by the addition of a new sub-para (2D) makes no difference to the manner I in which the appellant's lands have been valued as that amendment came into effect only on 1 March 1998, whereas the acquisition of the appellant's lands took place in 1990. Sub-paragraph (2D) for which no retrospective

intention is expressed in that sub-paragraph or any where else in the Act reads as follows:

> In assessing the market value of any scheduled land which is an estate land, or forms part of an estate land within the meaning of s 214A of the National Land Code, the market value shall not in any way be effected by the fact that it can be sold to one person.

What the amendment seeks to do is to protect estate land against fragmentation by providing that after 1 March 1998, when assessing the market value of such estate land, the legal restraint of s 214A of the NLC will not be considered if such land is transferred to one person or one entity as there is no fragmentation. However where such estate has been fragmentated by the transfer of such lands to two or more persons, the legal restraint of s 214A of the NLC is applicable when assessing the market value of such lands. For practical purposes estate lands transferred to one person or to one entity after 1 March 1998, will be assessed like any other lands whereas such lands if transferred to two or more persons would fetch a lower market value because of the legal restraint imposed by s 214A of the NLC.

As we have stated earlier the provisions of sub-para (2D) of para 1 of the first schedule to the Act have no application to the facts of this appeal.

The respondent had valued the appellant's lands at RM8,167 per acre. Following his ruling that the land had development potential, Abdul Hamid, J raised the value to RM15,000 per acre. He did so by taking into consideration the following factors.

(1) The lands were not valued lot by lot as was done by the respondent. Instead they were valued as a whole.

(2) The land were only accessable by ferry.

(3) A bridge linking the mainland with the appellant's lands was only 20% complete then.

(4) The appellant's lands were used for pig rearing at the material time.

(5) A recent award given by Mokhtar Sidin, J in respect of lands acquired in the same area with conditions similar to that of the appellant's lands. RM15,000 per acre was awarded for lands which were so much lesser in area than that of the appellant's lands.

Despite such considerations, the appellant still maintained that the learned judge had erred when he refused to accept the appellant's valuation of RM40,000 per acre as the potential value of the lands. We see no merit to that argument as the mere fact of the increase in the award from RM8,167 per acre to RM15,000 per acre is in itself an acknowledgment that the lands' development potentiality has been taken into account. Reading the judgment, we note that the judge had considered all factors as to locality, size, accessibility, use of the lands at the material time and regard to another award in the same locality as the appellant's lands. We therefore see no reason to disturb the findings of the learned judge in this matter and to that

end, we dismiss this appeal with costs and order that the deposit be paid out to the respondent to account of his taxed costs.

Appeal dismissed.

Reported by Peter Ling